97TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 97-809
2d Session } { Part 2

FEDERAL TRADE COMMISSION AUTHORIZATION ACT OF 1982

SEPTEMBER 20, 1982.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BOLLING, from the Committee on Rules, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 6995 which, on August 17, 1982, was referred jointly to the Committee on Energy and Commerce and the Committee on Rules]

The Committee on Rules, to whom was referred the bill (H.R. 6995) to amend the Federal Trade Commission Act to extend the authorization of appropriations contained in such Act, and for other purposes, having considered the same, report favorably thereon with amendments and recommended that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the bill as introduced) are as follows:

Page 5, strike out line 20 and all that follows through page 14, line 19 (and redesignate the subsequent sections accordingly).

Page 5, beginning on line 6, strike out "and section 25 as section 26 and section 27, respectively" and insert in lieu thereof "as section 25".

Page 14, line 21, strike out "Section 26" and insert in lieu thereof "Section 25".

Page 17, strike out line 15 and all that follows through page 18, line 24.

SCOPE OF REPORT

Under clause 1(q) of rule X, the Committee on Rules is vested with responsibility for the "rules and joint rules . . . and the order of business of the House."

In addition to its well understood responsibility for resolutions relating to the order of business, the committee receives original referral

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of all bills and resolutions changing or affecting the rules of the House.

H.R. 6995, in addition to amending the Federal Trade Commission Act to authorize appropriations and for other purposes, contains (in section 7) provisions relating to congressional review of final rules issued by the Commission, commonly known as a "legislative veto."

The Committee on Rules enjoys joint jurisdiction with the Committee on the Judiciary over legislative veto bills, which contain rulemaking provisions and are applicable to federal agency rulemaking generically. In the case of such bills, applicable to specific agencies or programs, the jurisdiction of the Committee on Rules is shared with the standing committee or committees of the House having responsibility for measures relating to the agency or program in question.

Although H.R. 6995 was jointly referred without limitation, the committee asserts jurisdiction only over certain provisions of section 7 and has confined its mark-up and reporting to that subject.

Section 7 of H.R. 6995 enacts as permanent law a legislative veto substantially similar to provisions contained in section 21 of the Federal Trade Commission Improvements Act of 1980 (Public Law 96–252) which expire September 30th.

In all other particulars of the bill, the committee defers, without recommendation, to the report to accompany the measure of the Committee on Energy and Commerce. (H. Rept. 97–809, Pt. I).

Development of Federal Trade Commission Restrictions

Although the committee confines its action on H.R. 6995 to the subject matter under its jurisdiction, it is necessary to review a legislative veto in the broad context of the responsibilities and mission of an agency to which it applies.

This legislation is part of a recent trend to restrict the activities of the Commission and to limit its authority and discretion. The committee notes, as much criticism of the Federal Trade Commission tends to overlook, that the current trend is the tail end of a classic "bell curve" in FTC activities that has been driven at each point by clear, if not consistent, legislative policies imposed on the Commission by the Congress.

The earliest lines of this bell curve lie in the late 1960's, when the Commission was under considerable attack as the "Little Old Lady of Pennsylvania Avenue." From the bold 1914 initiative forged by President Woodrow Wilson, in a coalition with remnants of the congressional progressive Republican followers of President Theodore Roosevelt, the FTC had grown virtually moribund.

Congressional efforts, during the early 1970's, to implement the 1969 recommendation of the American Bar Association focused on expansion of Commission powers and budget. These efforts culminated in the enactment of the Federal Trade Commission Act of 1974 (Public Law 93–637), commonly known as Magnuson-Moss. The Act created substantial new statutory and enforcement standards covering warranties, directed the FTC to initiate a used car warranty rule, generically broadened FTC authority over commerce, established detailed procedures to implement authority to prescribe trade rules, vested the Commission with broad new powers to bring and participate in judicial proceedings on behalf of consumers, and expanded the Commission budget.

In 1976, a "simple" reauthorization for the Commission (Public Law 94–299) was enacted, authorizing funds for fiscal year 1976, but other wise making no significant changes in law.

The other side of the "bell-curve" began in the 95th Congress with the rejection of two conference reports on a four year authorization for the Commission, which attempted to compromise a number of new proposed restrictions on the FTC. The first conference report (H. Rept. 95–892) was defeated February 28, 1978; debate indicates that the primary controversy was over the failure of the conferees to agree on a legislative veto. A second conference report (H. Rept. 95–1557) was defeated September 28th.

The second conference agreement had attempted to fashion a compromise version of the legislative veto that could meet the constitutional reservations of the managers for both Houses. But the substantial restrictions on the Commission contained even in that compromise signaled a significant shift in congressional sentiment. The report provided broad new exemptions to the savings and loan industry and imposed restrictions on FTC investigative, regulatory, and judicial authority. As a result of the defeat of the conference report, the Commission operated under continuing appropriations, without statutory authorization, during fiscal years 1978, 1979 and most of 1980.

Significantly expanded pressure to restrict the Commission became clear during consideration of the Federal Trade Commission Improvements Act of 1980 (Public Law 96–252). That legislation placed a variety of procedural requirements on FTC rulemaking activities, including a detailed legislative veto which insures a vote in each House of Congress on virtually all Commission rules. Other provisions:

Limited the FTC's authority to compensate interests which would otherwise not be adequately represented for the costs of participating in rulemaking proceedings, and reduced both the individual and aggregate compensation available.

Eliminated criminal penalties for failure to comply with a subpoena or lawful requirement of the Commission.

Prohibited the FTC from exercising its authority under the Lanham Act for cancellation of a trademark, on the ground that such trademark has become the generic name for the product.

Eliminated the authority of the FTC to promulgate any rule in the then pending children's advertising proceeding, or in any substantially similar proceeding.

Required the FTC to establish a plan for reducing the reporting burdens on small businesses with respect to the Quarterly Financial Report (QFR) Program.

Limited the authority of the FTC to promulgate certain trade regulation rules concerning funeral industry practices.

Subject to certain limitations, prohibited the FTC from investigating or prosecuting agriculturel cooperatives under the antitrust laws or the Federal Trade Commission Act.

Exempted the business of insurance from the investigative and reporting powers of the FTC, except for investigations relating to antitrust violations.

That authorization will expire on September 30th and certain provisions of the Act expire with it. As a result, there has been considerable concern over the need to process an authorization bill for the Commission.

Committee Consideration

H.R. 6995 was introduced on August 17, 1982 by Mr. Florio and cosponsored by Messrs. Digell, Broyhill, and Lent. The bill was referred jointly to the Committee on Energy and Commerce and the Committee on Rules.

On August 18th, the bill was considered by the Committee on Energy and Commerce, on the basis of subcommittee hearings held prior to introduction. At that meeting, the bill was ordered to be reported without amendment and subsequently reported to the House.

On September 16, 1982, the bill was considered, marked up and ordered to be reported by the Committee on Rules. Based on the understood desire of the House as a whole to act on this legislation, the handling of the measure was highly expedited but the committee is aware of extensive hearings by its Subcommittee on Rules of the House, over a four-year period, on the issues presented for action in this bill.

Testimony was heard from Messrs. Broyhill, Florio, Lent, Dannemeyer, and Luken and statements were submitted by Messrs. Gramm and Dingell.

Amendments were offered by Mr. Moakley, considered en bloc, and adopted. The amendments, which are discussed in the following section, strike section 7 of the bill, relating to congressional review of FTC rules, and make technical changes in section references to conform to that amendment.

The bill, as amended, was ordered to be reported by voice vote.

Subsequently a modified closed rule was reported on the measure, making in order the committee amendments and certain other amendments designated in the rule.

A related bill (S. 2499) has been reported by the Senate Committee on Commerce, Science, and Transportation. It is presently on the calendar in the other body and eligible for consideration.

Summary and Discussion

[Section 7 and Committee Amendment]

The bill authorizes appropriation for the Federal Trade Commission for fiscal years 1983, 1984, and 1985 and makes various changes in law, mostly as amendments to the Federal Trade Commission Act, applicable to activities, practices, and procedure of the Commission.

The committee would refer to its statement under the section of this report entitled "Scope of Report" and provides a summary and discussion only on the portion of the bill on which it has acted.

The first committee amendment strikes section 7 of the bill, relating to congressional review of Federal Trade Commission rules. All of the other committee amendments are technical in nature and make various corrections in section references to conform to that amendment.

Section 7 of the bill would insert a new section 25 of the Federal Trade Commission Act. In large measure, this provision parallels temporary provision of law, section 21 of the Federal Trade Commission Improvements Act of 1980 (Public Law 96–252). The provisions

of the proposed new section 25 of the Federal Trade Commission Act, recommended to be stricken by the committee amendment, are as follow:

Submission and approval of rules

Subsection (a) would require each FTC rule to be submitted to Congress. The rule would become effective after 35 days of continuous session if there was no congressional action related to the rule. If any Member of either House introduced a resolution of disapproval, the period would be extended by an additional 55 days. At the conclusion of the 90 days, the rule would become effective unless each House of Congress had agreed to a concurrent resolution to disapprove the rule, during such period.

The committee amendment strikes the provision on the grounds that it is unconstitutional, that it is unnecessary, and that it imposes needless and cumbersome burdens on efficient operations of the Commission. This issue is discussed in greater detail under the section of this report entitled "Basis of Committee Amendment."

Exercise of rulemaking power

Subsection (b)(1) is a disclaimer which states that the subsection is enacted as an exercise of the rulemaking power of each House, changes existing rules only to the extent it is inconsistent, and is subject to change in the same manner as any other rule of either House.

The committee amendment strikes the provision only because it also strikes all rulemaking provisions to which the paragraph refers. The committee notes that the authority of each House to "determine the rules of its proceedings" is constitutionally grounded and the power of each House to modify rules it chooses to enact in statutory form is unaffected by whether that statute carries such a disclaimer. Nevertheless such language is customary and the committee considers its inclusion appropriate.

Committee jurisdiction

Subsection (b)(2)(A), relating to referral of resolutions disapproving FTC rules, and the second sentence of subsection (a)(1), relating to referral of FTC rules submitted to Congress, make certain changes in the rules of both Houses which set the jurisdiction of their standing committees.

In each case these provisions of the proposed new section would require referral to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, respectively, whether or not that committee has jurisdiction over the subject matter to the rule.

The commission amendment strikes this provision on the ground that the specific approach is inappropriate. If the intent is to remove the jurisdiction of any committee which might qualify for alternative referral, or for joint or sequential referral, the committee believes that end is better accommodated by direct amendment of the rules of each House. Potentially, a resolution to disapprove a rule and a bill relating to the same subject matter could be referred to different committees in one or both Houses and cloud the ability of Congress to act in an appropriate manner.

Discharge

Subparagraphs (B) and (C) of subsection (b)(2) provide for a privileged motion to discharge the appropriate committee if a resolution to disapprove an FTC rule is not reported by the end of 75 days of continuous session. In the Senate, a Member filing a discharge petition needs only 19 other signers. In the House, a Member would need only 46 other signers.

The committee amendment strikes this provision on the grounds that it is unnecessary and could lead to disruption of the orderly conduct of business before each House. Adequate discharge procedures exist under the rules of each House.

Although the number of FTC rules is relatively small, the committee is aware of a significant proliferation of measures which provide special procedures for legislative veto resolutions. A point is quickly being approached at which these procedures could threaten the ability of the Congress to carry out its regular responsibilities.

To provide parliamentary tools by which one-fifth of a House may take an hour away from business desired to be scheduled by a majority is a matter that should be approached with more caution by Members of both parties. In the aggregate, there are as many federal rules in a year as there are hours.

The committee would also note that the ease of obtaining such a scarce number of signatures contributes to the concerns expressed about subsection (d).

Coordination of consideration

Subsection (b)(3) provides certain procedures which insure that both Houses will act on the same resolution.

The committee amendment strikes the provision because it strikes all of the special rules for resolutions to which this provision might apply.

Within the context of the other rules contained in the subsection, however, this provision is considered a sensible approach to a problem that did occur during the present Congress in connection with a proceeding on a resolution considered under rules similar to those in this subsection.

Floor procedure

Subsection (b)(4) makes privileged a motion to proceed to the consideration of resolution disapproving an FTC rule after it has been reported or discharged from committee. It provides for ten hours of general debate. It eliminates most procedural motions relating to floor procedure, permitting a relatively straightforward vote on such resolutions.

The committee amendment strikes this provision on the ground that it is unnecessary and could lead to disruption of the orderly conduct of business before each House.

Traditionally, neither House has found it appropriate to carry special rules for most classes of measures. Even declarations of war, constitutional amendments, and appropriations do not carry the degree of special privilege proposed to be accorded to resolutions to disapprove FTC rules.

One of the committee's principal functions, in considering special orders for floor consideration of bills, is to determine appropriate time limits for debate. Although the resolution to establish the budget of the entire federal government is subject to 10 hours of debate, the committee has encountered no other modern case in which it has considered such a period to be appropriate.

Appeals

Subsection (b)(5) prohibits debate on appeals from the ruling of the chair on any point of order which may be raised during consideration of FTC disapproval resolutions.

The committee amendment strikes the provision because it also strikes the rulemaking provisions from which appeals might be taken. This provision, presumably, is of more concern in the Senate. In the House, the Speaker and chairmen of the Committee of the Whole are advised by a non-partisan parliamentarian. Appeals are seldom taken from rulings of the chair and are virtually never successful. The House is adequately protected from the use of an appeal as a dilatory tactic because it is subject to motions for the previous question and to table.

Consideration of other resolutions

Subsection (b)(6) prohibits consideration of FTC disapproval resolutions in either House after that House has approved a similar resolution. The provision is intended to prevent use of such resolutions as a dilatory tactic.

The committee amendment strikes the provision because it strikes all of the special rules for resolutions to which this provision might apply. This provision, presumably, is of more concern in the Senate. The committee believes that neither this subsection nor the rulemaking provisions of any legislative veto law of which it is aware, in any manner, limit the discretion of the Speaker to decline to recognize a Member for any purpose as clearly dilatory as the one contemplated by this provision.

Repromulgation:

Subsection (c) establishes certain procedures for the Commission to act on a new rule after a rule has been disapproved.

The committee amendment strikes the provision because it strikes the disapproval procedure which might necessitate such repromulgation. The committee is aware that Congress can always disapprove an agency rule by law but contemplates no need for a standing provision to govern repromulgation. Presumably that matter would be dealt with in the bill overturning the rule, as was the case in the Federal Trade Commission Improvements Act of 1980 (Public Law 96–252) which set aside ongoing proceedings relating to cereal, children's advertising, and the funeral industry and set standards for subsequent rulemaking in those areas.

Congressional approval not implied

Subsection (d) is a disclaimer which states that congressional inaction on, or rejection of, a resolution under this section shall not be relied upon in determining congressional approval or the validity of a rule to which the resolution applies.

The committee amendment strikes the provision because it strikes all the basic authority to which this provision might apply. The committee would also note that it would be unreasonable to expect the courts to pay serious attention to the provision.

By the enactment of any legislative veto, the Congress (and even its individual Members) accept a significant responsibility for the rules to which the veto applies. This is particularly true if Congress actually votes down a disapproval resolution, but equally can apply to the question of congressional inaction. This presumption has to be especially strong when the legislative veto in question, like the present case, provide a method by which a very small minority of the House can require a vote on the subject.

In this regard, the committee would note that both the U.S. Court of Appeals for the District of Columbia [1] and the U.S. Supreme Court [2] have discussed congressional inaction in connection with decisions on agency rules which were subject to legislative veto procedures.

Court review

Subsection (e) provides special procedures applicable to the federal courts and is intended to expedite a Supreme Court decision on the constitutionality of legislative vetoes generally or at least of the provision in this section.

The committee amendment deletes this provision and does so on several grounds. First, the committee having legislative jurisdiction for this provision has indicated its concern with the legal and practical ramifications of this review procedure and the Committee on the Judiciary has waived its unequivocal right to sequential referral in order to accommodate the scheduling concerns of the committees handling the bill. That committee's comments are instructive:

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., September 13, 1982.

Hon. RICHARD BOLLING,
Chairman, Committee on the Rules,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request for comments on H.R. 6995. The full Committee has not had an opportunity to meet to discuss this matter because of the press of other business. On behalf of the Committee, however, I write to express some serious concerns about several of the provisions found in the bill.

The portions of this bill that creates a legislative veto mechanism also attempt to establish a means for the prompt judicial resolution of any constitutional challenges to the veto provisions. Unfortunately the judicial review sections fail to achieve its stated purposes.

[1] In a decision of the U.S. Court of Appeals (D.C. Circuit) in *State Farm Automobile Insurance Company* v. *Department of Transportation,* 680 F.2d 206 (D.C. Cir. 1982) the Court observed that the rule in question had been subject to a legislative veto and stated that "Congress allowed the standard to take effect when neither of the concurrent resolutions needed for disapproval was passed" and alluded to the comparative ease of obtaining a legislative veto, as compared to a law. Although the Court specifically conceded that "failure to disapprove the standard cannot be read as a congressional enactment," the decision does rely on the existence of a legislative veto as part of a "legislative history as a whole" which "suggests a congressional commitment . . ." 680 F.2d at 228.

[2] In a decision of the U.S. Supreme Court in *North Haven Board of Education* v. *Bell,* 102 S. Ct. 1912, 1924 (1982), the Court cited the existence of a legislative veto applicable to the rule in question as part of a legislative history which "lends weight to the argument that coverage of employment discrimination was intended."

First, the bill purports to give standing to sue to "any person" to commence an action in Federal court to challenge the constitutionality of the Act. This type of Congressionally created standing may violate the requirements of Article III of the Constitution that requires that there be a "case or controversy" before jurisdiction attaches. In this context I call to your attention a letter (attached) the Committee has received from the Attorney General on this issue. While we have some serious reservations about the correctness of the Attorney General's opinion,[1] the issue is not without controversy. In fact the existing precedents at the lower court level are divided on the question of whether the Congress can create such standing. In light of the absense of any substantial study of this provision, it may be wise to delete or modify the "standing" provision.

Second, the bill requires the District Court to certify all constitutional questions to the Courts of Appeal. This approach virtually prohibits fact finding hearings and record development that facilitate appellate review. Provision for District Court review would not materially slow down the litigation. Moreover, such an approach would help determine factual issues that could resolve the case without further court action.

Third, the bill requires that the Courts of Appeal hear each of these cases sitting en banc it ignores that vast differences in the size and procedures of the Court of Appeal. This provision would mean that in the First Circuit four judges would hear the case whereas in the Ninth Circuit ten judges would be involved.[2] In addition, mandating en banc consideration is counterproductive because it would most likely delay consideration and disposition due to the increased number of judicial participants.

Fourth, the bill is deficient because it mandates direct or mandatory appellate review of the decisions of the Courts of Appeals. This approach runs totally counter to the legislative trend of the past fifty years to grant the Supreme Court greater discretion in determining which cases it should hear. In fact, all nine Justices of the Supreme Court wrote to the Committee earlier this Congress in favor of H.R. 6872 (then H.R. 2406) which virtually eliminates direct appeals to the Supreme Court.[3]

Finally, the bill is deficient insofar as it attempts to mandate expedited treatment of these cases in the Courts of Appeal and in the Supreme Court. In the view of the Committee, the Judicial Conference of the United States, the Department of Justice and the American Bar Association such provisions are irrational and should be strongly avoided.[4] Under current Federal law there are over eighty civil priority provisions, thus, adding another new—and conflicting—priority will not achieve the stated goal. Moreover, the courts themselves are in a much better position to assure the rapid resoluton of

[1] See generally Braveman "Standing: A Dialogue between the courts and Congress," 2 Cardozo L. Rev. 31 (1980).

[2] See Letter from a Circuit Executive to the Congress relative to a similar provision in an earlier statute reprinted in Note, The Impact of Civil Expediting Provisions of the United States Court of Appeal, 37 *Rec. Assn. Bar of the City of New York* 1, 24.59 (1980).

[3] The rationale for this position is set for in S. S. Rep. 96–35.

[4] It should be noted that the Committee on the Judiciary has reported a bill. H.R. 6872, that amends or repeals virtually all of these expediting provisions. The Committee bill, which was approved by voice vote, would substitute a system that permits the courts to set up rules for which civil cases to handle on an expedited basis. In addition, the bill provides that any action involving an application for temporary or preliminary relief would be given a priority.

important cases, than the Congress. Under the bill as written the most frivious litigation would be granted priority. Such an approach is clearly not what was intended.

In conclusion the Committee on the Judiciary strongly suggests the modification or deletion of the provisions criticized above.

Sincerely,

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice.

Second, the committee would also note that the Department of Justice has questioned the constitutionality of a "standing" provision, in other bills, whose language substantially parallels subsection (e)(1).[3]

Third, in regard to practical effects, the committee would call the attention of the House to the comments of the attorney representing the House in defending the constitutionality of the specific provision proposed to be re-enacted in this section [4]:

OFFICE OF THE CLERK,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., September 10, 1982.

Hon. RICHARD BOLLING,
Chairman, Committee on Rules,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to you concerning section 7 of H.R. 6995, "Federal Trade Commission Authorization Act of 1982", specifically that provision providing for expedited consideration of court challenges to the exercise of the legislative review provisions.

This provision is identical to one currently codified at 15 U.S.C. § 57a–1(f), providing for expedited calendaring and disposition of suits filed under the section and an action filed pursuant to that section has already been docketed and calendared for argument in the United States Court of Appeals for the District of Columbia Circuit. *Consumers Union of U.S. Inc. and Public Citizen* v. *Federal Trade Commission, United States Senate and United States House of Representatives*, Civ. Action No. 82–1512 (D.D.C.).

As counsel representing the House of Representatives in this case I feel compelled to inform you of the procedural problems which this provision presented in the course of our participation in the above referenced litigation. As a result of our experience in the *Consumers Union* case, we believe the provision for expedition is unnecessary and ill-advised and, in addition, seriously disadvantaged the position of

[3] Departmental views of the U.S. Department of Justice on H.R. 2408, 97th Congress, submitted to the Committee on the Judiciary, U.S. House of Representatives, June 1, 1982.

[4] A recent study by the Congressional Research Service identifies over eighty so-called "expediting" provisions that are currently effective. The report concludes that as a consequence of the proliferation of such provision "the priorities of handling cases by the courts has become an uneven patchwork raising questions of the validity of [their] expressed rationale" and raises "substantial doubt whether the courts can effectively administer more than a few such provisions, and greater doubt that the courts can administer a large number of them." Beck. Priorities in Deciding Cases Before United States Courts (CRS/ALD, June 17, 1982). The efficacy of such an expedition provision is thus questionable both generally and with respect to the particular situation at hand.

the House and Senate in obtaining thorough and fair consideration in the courts. Moreover, the purpose of this provision to obtain "a definitive resolution of the constitutionality of this procedure. . . [because] . . . [I]t may be some time before another case is properly framed around this question," 126 Cong. Rec. S1090 (daily ed. Feb. 6, 1980) (remarks of Sen. Muskie) is no longer being served, since the Supreme Court now has before it two cases involving the constitutionality of legislative review devices, *Immigration and Naturalization Service* v. *Chadha*, Nos. 80–30 1832, *et al.*, restored to the calendar for reargument on July 2, 1982 and *Consumer Energy Council of America* v. *FERC*, Nos. 81–2008, *et al.*

Notwithstanding the fact that this was so at the time the *Consumers Union* case was filed, the district court certified the constitutional questions, upon motion of the plaintiffs and the defendant Federal Trade Commission (which has aligned itself with the plaintiffs) to the court of appeals before the House or Senate even had an opportunity to be heard in the district court. The district court entered an *ex parte* order certifying the case just three (3) days after the motion was filed and seven (7) days before the normal ten (10) day period provided by the Federal Rules of Civil Procedure for response to motions had expired.

Despite our efforts in both the district court and the court of appeals to remedy the premature certification, the case has already been set for argument on October 12, 1982 and will be fully briefed by September 28, 1982.

All parties concede that cases involving the constitutionality of legislative review mechanisms are of utmost importance and present complex legal issues. The provisions mandating simply that the case be advanced on the docket and disposed of "to the greatest possible extent" in an expeditious manner have unfortunately already been interpreted by the courts to mean that Congress, as a party to these cases, need not have been given an opportunity to be heard in the district court on the important task of finding facts and framing the issues, *see* Memorandum Opinion, *Consumers Union, et al.* v. *Federal Trade Commission, et al.*, Civil Action No. 82–1512 (D.D.C. issued July 23, 1982) (copy enclosed) and to justify an expedited briefing schedule which allows inadequate time for the House and Senate to prepare and brief their legal positions.

For the foregoing reasons, more fully explained in the motions and briefs submitted to both the District Court and Court of Appeals in the *Consumers Union* case, copies of which are enclosed, we believe, as lawyers representing the House, that the expedition provisions are unnecessary and prejudicial to sound and thorough constitutional adjudication. In the one case they have been applied in, the courts have already interpreted those provisions to justify a hasty and inefficient procedure for considering a constitutional matter of great import to the House of Representatives.

Sincerely,

STANLEY M. BRAND,
General Counsel to the Clerk.

Other provisions

Subsections (f) and (g) are technical and definitional matters relating to calculation of continuity of session, format of disapproval resolutions, and applicability of the review procedures.

The committee amendment deletes these provisions. They present no controversy but are stricken because they relate to the implementation of other provisions stricken by the committee amendment.

The committee notes that the provision cures a procedural problem, posed by the prior legislative veto applicable to the Commission, by providing that continuity of session of Congress is broken only by adjournment sine die at the end of a Congress. The expiring law calculates continuity on the basis of each session. In the one experience with this procedure, the "used care rule," it was necessary for the rule to be promulgated and reviewed by Congress twice and the stauts of the rule was left in doubt for months more than was necessary.

Basis of Committee Amendment

I. CONSTITUTIONALITY OF THE LEGISLATIVE VETO

In H.R. 6995, the committee concludes that it is faced with an inescapable constitutional issue. It reaches that conclusion with full respect for the integrity and sincerity of the large number of Members it is aware have reached a different conclusion.

Although the committee has serious practical concerns with the amendments made by section 7 of the bill, it proposes that the section be stricken in its entirety on the basis that the legislative veto, as embodied in this bill, and indeed in most other contexts, is inconsistent with the most important and fundamental principles of our constitutional system of government.

The committee reaches its determination as an independent conclusion. But it is strongly persuaded by the overwhelming body of constitutional law. The U.S. Supreme Court has yet to rule on the subject, although a decision is expected in the Court's next term. Decisions arrived at separately by the U.S. Courts of Appeals, in two of the Nation's eleven circuits, have found the device unconstitutional.[5] In no circuit, at the appeals level, has a decision ever been reached finding the device constitutional. Since the first use of the device in 1932, Attorneys General for each President, since Franklin Delano Roosevelt, have argued unequivocally against the constitutionality of the legislative veto.

Separation of powers

The constitutional failings of the legislative veto lie at the center of the most fundamental concern that was before the Constitutional Convention. The authors made a clear decision to erect a system based on the English parliamentary practice, but starkly different in some very important wyas.

The most significant difference concerns the doctrine of separation of powers which the Supreme Court has stated to be "at the heart of our Constitution." [6]

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[5] *Consumer Energy Council of America* v. *FERC*, — U.S. App. D.C. —, 673 F.2d 425 (D.C. Cir. 1982), 1982), *appeal pending*, Nos. 81–2008, et. al (Supreme Court); and *Chada* v. *INS*, 634 F.2d 408 (9th Cir. 1980), *appeal pending*, Nos. 80–1832 et. al (Supreme Court). 80–1832 et. (Supreme Court).

[6] *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976).

Indeed, as the famed English jurist Blackstone observed:

> In all tyrannical governments the supreme magistry, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and whether these two powers are united together there can be no liberty.[7]

The separation is constitutionally defined by vesting in Congress "all legislative powers" and in the President the responsibility that "the laws be faithfully executed and in the courts the judicial power of the United States." In actual execution, the lines may not always be absolutely clear, because, as Justice Jackson observed:

> While the Constitution diffused power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separatedness and interdependence, autonomy but reciprocity.[8]

However, the committee is persuaded that the legislative veto is an unconstitutional incursion into executive functions, in that it brings Congress into direct involvement with the "execution" of the laws and usurps the traditional role of the judiciary in passing upon the validity of administrative regulations.

Intrusion on judicial power

On its face, the veto provision of the Act vests in the two Houses of Congress an extra-legislative power to perform the function reserved by the Constitution to the courts of determining whether a particular executive act is within the limits of authority established by the existing statute. Thus to the extent that an exercise of the veto mechanism is meant to prevent the effectiveness of agency action that is perceived to exceed its statutory authority, it unconstitutionally intrudes upon the exercise of judicial power by the courts.

The function of the courts in reviewing agency action is to interpret the statutory delegation and determine whether the administrative action accords with that delegation. When both Houses of Congress agree to a concurrent resolution of disapproval, the courts are prevented from exercising review, even though under prior decisions on the very same statute, or on analogous statutes, they might have upheld the agency's exercise of discretion. Even if the rule is not vetoed, the courts may be presented with the difficult question of how much weight, if any, to give to the implicit congressional finding that the rule represents a proper exercise of statutory discretion.[9]

In either event, the congressional review in such circumstances is entirely standardless and may be conducted without equal participation of interested parties. If there is a dispute between the Houses and the agency as to the congressional intent and the rule is defeated, interested parties are denied the opportunity to obtain a judicial interpretation. Further, the Houses of Congress reviewing the proposed rule are unlikely to look primarily to the objective legislative intent at the time the statute was enacted, but rather to the intent at that

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[7] W. Blackstone, *Commentaries*, p. 146–47.
[8] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952)
[9] As previously indicated, the courts are already utilizing the existence of veto provisions to attribute some substantive meaning to congressional inaction. See cases cited *supra* at notes 1 and 2.

moment of congressional review. This permits Congress effectively to alter the meaning of a statute as circumstances and the composition of Congress change over time. Assumption of this power enhances the role of Congress and diminishes that of the Judiciary. It is, then, "an assumption by one branch of powers that are essential to the operation of a coordinate branch . . . [which] disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the government," [10] and therefore a violation of the separation of powers doctrine.

Appointment of officers

It has been clearly settled that Congress may not appoint any officer to carry out an executive function.[11] Nor may Congress itself seek to exercise any such function.[12]

The legislative veto, in certain contexts, is in doubtful comportment with these principles. As it applies to an independent regulatory commission, in particular, the legislative veto raises significant policy questions of constitutional character. The establishment of such a commission involves a delegation of functions to the agency, subject to certain special limitations. The agency is vested with functions of a mingled executive, legislative, and judicial character. But the functions of no branch of government are impaired.

Although Congress may not directly supervise the regular functions of the agency, the agency is required to act within the framework of the law Congress has written, in whatever degree of specificity it may have chosen. The Congress can amend that law and may exercise any other proper powers as exist within in oversight and appropriations functions.

Although the officers do not serve at the daily pleasure of the President, he makes all appointments as terms expire. And the courts retain the authority to review agency actions as a matter of law.

It is a fragile constitutional scheme but the courts have recognized the vital importance of this system and both the appropriateness of limitations on Presidential removal power [13] and delegation of quasi-legislative authority [14] conclusively have survived judicial challenge.

The committee is concerned that the intrusion of expanded supervisory powers over the intimate details of regulation, by what is already the stronger of the two branches in relation to independent agencies, leaves the appropriateness of this balance open to serious doubt.

In this regard, it is important to note that the courts have upheld a wide variety of such statutes, all of which stretch the constitutional fabric. But the Supreme Court was forced to hold unconstitutional the only effort Congress has made to write such a scheme at variance with the standard structure of this delicate balance, in a decision no unsympathetic to the reasons behind that effort.[15]

Presentation clause

Although the Framers of the Constitution recognized the importance of the doctrine of separation of powers, the record of consideration

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[10] *Chadha* v. *Immigration and Naturalization Service*, 634 F.2d 408, 425 (9th Cir.) (1980), *appeal pending*, Nos. 80–1332 et al. (U.S. Supreme Court).
[11] *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976).
[12] *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189 (1928).
[13] *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).
[14] *Federal Trade Commission* v. *Gratz*, 253 U.S. 421 (1920).
[15] *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

makes clear their understanding that it could be nothing more than a doctrine unless each branch was provided with adequate tools to protect itself. As Woodrow Wilson observed, no branch could maintain its independence without "the guaranty of the Constitution that its own domain should be absolutely safe from invasion . . ." [16]

Of these guarantees, the system of checks and balances, the most important is the Presidential veto. Without it, congressional supremacy, would be unavoidable, Madison argued.[17]

That the Framers anticipated the devices by which a legislative body might expand, into functions reserved from it, is underscored by the presentation clause which requires that, not only bills but also "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary" must be presented to the President for veto, subject to congressional override, or for approval. The debate of the Convention underscores the intent of the Framers to require Congress to follow this process for all actions having the effect of lawmaking.[18]

Clause 3 of Article I, sec. 7, provides that "Every order, Resolution, or vote, to which the concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States." This provision, along with Article I, sec. 7, cl. 2 (the veto clause) set up the fundamental prerequisites to the enactment of federal laws: bicameral passage of the legislation, and presentation for approval or disapproval by the President. Such exceptions to this fundamental requirement as exist relate to concurrent resolutions that are not legislative in effect, and the four examples set forth by the Court in *Consumer Energy Council of America* v. *FERC* (supra), i.e., legislative initiation agency investigations, presidential plans for executive reorganization, presidential foreign affairs and national defense decisions, and, congressional proposals for constitutional amendments. Not all of these exceptions have been constitutionally resolved by the courts, nor do they all represent substantive lawmaking.

In any event, none are applicable to H.R. 6995.

The committee would concede that the Framers could no more have envisioned the present legislative veto than the Federal Register. But the committee believes that the general thrust of the device is exactly what the Framers intended to preclude in clause 3 of section 7 of article I.

Effective lawmaking

The most persuasive argument in favor of the constitutionality of the legislative veto has related to the assertion that the veto isn't actually lawmaking. During a Rules Committee hearing on the subject, Senator Harrison Schmitt argued that the legislative veto "is a form of legislative activity which does not require the concurrence of both Houses since the effect of such language is not to make law but rather to preserve the status quo." [19]

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[16] Woodrow Wilson, "Congressional Government" (Boston : Houghton Mifflin Co., 1885), p. 309.
[17] The Federalist No. 47 (J. Madison) at 324–326 (J. Cooke ed. 1961).
[18] 2 M. Farrand, "The Records of the Federal Convention of 1797," p. 301–5.
[19] Hearings before the Subcommittee on Rules of the House, Committee on Rules, 96th Congress, 1st Session (Washington : GPO), p. 209.

The history of the exercise of the specific veto contained in H.R. 6995 appears to rebut this fundamental assertion by the proponents of the legislative veto.

Recognition of the prevalence of warranty problems with respect to the sale of used cars prompted the Congress in 1974 to include as part of the Magnuson-Moss Warranty Act (Public Law 93–637) a provision (section 109(b)) directing the Federal Trade Commission to "initiate . . . a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer" by prescribing "rules dealing with such warranty practices."

On August 14, 1981, more than six years later, the Federal Trade Commission completed development of such a rule. Until two years prior, the course of this rulemaking would have reached its conclusion. Under the legislative veto provision included in the Federal Trade Commission Improvements Act of 1980 (Public Law 96–252), however, the matter remained unsettled. That Act requires that any rule which the Commission promulgates must be submitted to Congress and the rule can be killed if both Houses of Congress adopt, within 90 calendar days of continuous session, a concurrent resolution disapproving the rule.

In the first application of this provision, Congress disapproved the used car rule.

During the six years of development of the rule, in compliance with a statutory requirement, four authorization bills for the Federal Trade Commission were reported and acted on in each House. And two bills were enacted. Congress had ample opportunity to repeal or amend section 109(b) of Magnuson-Moss (15 USC 2309(b)) which statutorily requires the used car rule. This provision continues to be carried in law and, to the extent it is not effective as the result of the exercise of the legislative veto, that veto is effecive lawmaking in a form that attempts to bypass the constitutionally-mandated process of law.

Necessary and proper

Other advocates of the legislative veto have relied strongly on the provisions of clause 18 of section 8 of article I which authorize Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." They have asserted that Congress and the Executive enjoy broad discretion under the "necessary and proper" clause to reach appropriate political accommodations.

This argument has merit. The committee would note the comments under the item of this section entitled "Appointment of officers" which discusses the organic schemes that have produced most independent regulatory agencies. In the delegation of legislative functions and the restrictions on Presidential supervisory powers, these plans strain constitutional limits.

But the constitutionality of these plans has been consistently upheld in the course of repeated challenge throughout this century. Presumably the courts are prepared to permit some accommodations, which do not overly strain the constitutional fabric, when faced with

compelling cause. The important and useful nature of this particular accommodation is noted in the report of the 1949 Hoover Commission:

> The independent regulatory commission is a useful and desirable agency where constant adaptation to changing conditions and delegation of wide discretion in administration are essential to effective regulation.
>
> The independent commission provides a means for insulating regulation from partisan influence or favoritism, for obtaining deliberation, expertness and continuity of attention, and for combining adaptability of regulation with consistency of policy so far as practical.[20]

But in this, or any accommodation that strains the fundamental doctrine of separation of powers, the courts must hold Congress to a substantial showing under the "necessary and proper" clause.

The comittee would note that it is conceivable that some legislative vetoes may meet this test.[21] But, in general, the legislative veto does not meet such a standard and the committee perceives the standard as particularly lacking in the case of H.R. 6995.

During the six years that the used car rule was in development and the law requiring it remained on the books, unamended, the Congress amended the Federal Trade Act to totally remove all FTC authority over the savings and loan industry and substantially remove its authority over the business of insurance. Amendments were also enacted which overturned on-going rulemakings, and restricted subsequent activities, in regards to cereal manufacturers, the funeral industry, and children's advertising.

As discussed in the section of this report entitled "Development of Federal Trade Commission Restrictions," the agency has been driven, both to and from, virtually every activity of the past decade by shifting congressional directives. No clearer case of congressional direction and supervision, within the proper process of law, exists than the FTC. And, on that basis, the application of a legislative veto to the FTC fails to meet the requisite standard.

Severability

The problem of severability involves a determination whether an invalid congressional veto provision as enacted by Congress is so essential to the enactment of the rest of the statute or provision to which it was appended that the striking down of the veto clause would also render the rest of the statute or provision inoperable. If the courts find inseverability then the rulemaking power of the agency could be struck down as a consequence. The argument in such a case would be that the legislative history of the delegation was such that it was compellingly clear that the delegation to the agency, and the applicability of congressional review procedures to it were so inextricably linked that the delegation could not have been enacted without its inclusion. In a rare instance, a court may refuse to determine the constitutionality of a legislative veto provision because the provision is inseverable from the remainder of the Act.[22] However, most courts do not follow this rationale.

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[20] Commission on Organization of the Executive Branch of the Government, "Task Force Report on Regulatory Commissioners" [Appendix N] (Government Printing Office: 1949), p. viii.

[21] *Pacific Legal Foundation* v. *Watt*, 529 F.Supp. 982 (D.C. Mont. 1982).

[22] *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977) *cert. denied*, 434 U.S. 1009 (1978).

The existence of a severability clause does not normally create a presumption of severability. "Rather," as the Court of Appeals stated in *FERC*, supra," the question is whether Congress would have enacted the remainder of the statute without the unconstitutional provision." Or, to put it in other terms, that "... a court should determine whether the (alleged invalid) provision was so essential to the legislative purpose that the statute would not have been enacted without it." If the invalid congressional veto provision is deemed severable, the clause to which it was relevant would be sustained along with the rest of the provision in which the clause was included. If the Court finds that the veto provisions were inseverable, under the concept of essentially it could find the clause unenforceable and possibly the entire provision of which it forms a part if it is deemed essential to such entire provision.

The committee would assert that its own record, in the handling of Title X of the Congressional Budget and Impoundment Control Act of 1974 (Public Law 93–344), and that of the Committee on Foreign Affairs, in the handling of the War Powers Resolution (Public Law 93–148), are compelling examples of such histories of essentiality.

As to the Federal Trade Commission, the adoption of a legislative veto, in the context of a routine 1980 authorization, for an agency establish in 1914, may not make such a case. The question is, however, now before the Supreme Court in respect to two other agencies and since the Court nas never passed upon the issue it would appear more prudent to await a decision from that body before including a veto provision in this bill.

II. LEGITIMACY OF THE LEGISLATIVE VETO

If a case could be made for the constitutionality of the legislative veto, it would still fall to the committee to examine the appropriateness of such a proposal. The committee has considered this matter at some length; indeed the issue has constituted the principal work of one of its subcommittees.

In this regard it is important to examine the intent of the separation of powers doctrine. Some of the Framers, as discussed in the previous section, were particularly concerned by the tendency of legislative bodies to assume the total functions of government and sought to prevent such a tendency but erecting a system of checks and balances.[23]

But the committee views as equally compelling the arguments of Thomas Jefferson that enforcement of the separation of powers doctrine, through the Presidential veto, was of equal importance to the viability of the legislative branch and that the separation of legislative and executive functions would free Congress from the details involved in the execution of law.[24]

NATURE OF RULEMAKING PROCESS

In regard to the appropriateness of detailed congressional involvement in the regulatory process, the committee considers it appropriate to review the different natures of rulemaking and lawmaking and has selected the history of the used car rule as a pertinent case to review.[25]

[23] *The Federalist* No. 47 (J. Madison), (J. Cooke ed. 1961), p. 324–6.
[24] 4 Jefferson, "The Writings of Thomas Jefferson" (P. Ford ed. 1894), p. 424–25.
[25] The committee would acknowledge the considerable support and assistance of the Congressional Research Service in research relating to the history of the used car rule and particularly notes the contribution of Bruce K. Mulock of the Economics Division, whose work has been liberally used in this section.

FTC investigation and rule development

The used car rule vetoed by the Congress grew out of an investigation begun by the FTC's Seattle Regional Office in 1973. That investigation led to a 1973 report which recommended that the FTC regulate the sale of used cars through a system of required inspections by dealers, disclosure of defects, and mandatory warranties on parts found to be without defects. Subsequently, the FTC Commissioners directed the staff of the Bureau of Consumer Protection in Washington, D.C. to continue the investigation.

In 1975, while the staff investigation was in progress, the Magnuson-Moss Warranty Act became effective. In title I of the Act, Congress directed the FTC to initiate a rulemaking proceeding dealing with "warranties and warranty practices in connection with the sale of used motor vehicles." This statutory directive expressly authorized the FTC to proceed under both Title I of the Magnuson-Moss Act and any other statutory authority available to the agency.

In a December 1975 report, the Bureau of Consumer Protection's staff recommended that the Commission initiate a rulemaking proceeding. The report described warranty practices, as well as a variety of other practices related to the sale of used cars, which, in the staff's opinion, violated not only Title I of the Magnuson-Moss Act, but also Section 5 of the Federal Trade Commission Act which declares unlawful "unfair or deceptive acts or practices in or affecting commerce."

Initial version of the rule

After reviewing the staff's initial report, and in compliance with the congressional directive, the Commission published an Initial Notice of Proposed Rulemaking on January 6, 1976, in the Federal Register. The Initial Notice proposed a Trade Regulation Rule (TRR) designed to remedy the allegedly unlawful practices through (1) a "window sticker" posted on each used car disclosing warranty terms, warranty disclaimers, prior use of the vehicle, mileage, prior repairs, and dealer identification information and, (2) a specified form of warranty disclaimer to be used in "as is" sales contracts. The disclosure of mechanical defect information and a "prepurchase inspection opportunity" which would have given consumers the right to take a car to a third party for inspection prior to purchase were also included as suggested remedies, for public comment.

Following a number of additional procedures, including the publication of two more Notices, the holding of public hearings in six cities during 1976 and 1977, and a report by the Presiding Officer assigned to the rulemaking, the staff recommended a revised TRR which would have required mandatory inspection and disclosure of defects regarding certain mechanical and safety components of used cars. The disclosures of warranty coverage, repair cost estimates, prior use, mileage, availability of service contracts, and dealer identification information were also included in the revised rule. These disclosures were to be made on a "window sticker" attached to the side window of the used car.

Responding to the proposal for mandatory inspection and disclosure of defects, the NIADA commented in February 1979 as follows:

> It is always difficult and often impossible to determine the exact condition of a used product. Its parts are worn and may

have been subjected to abusive treatment by previous owners. Neither buyer nor seller can ever be certain that some latent defect which evades discovery will not surface after resale. Disclosure of significant known defects, however, would assure that consumers, who would possess the same information as the dealer about the car's condition, could bargain for a reasonable price and warranty coverage to reflect the car's known mechanical condition.

NIADA believes that a beneficial balance in consumer and dealer knowledge can be achieved by means of a rule requiring a window sticker which would disclose both significant known defects and defects discovered during any state-required inspection, all defects which the dealer is personally aware of other than cosmetic or minor defects.

Following a number of other procedural requirements, including the receipt of comments from the public, the staff's summary of post-record comments, memorandum recommending modifications in the proposed rule, and a memorandum from the Director of the Bureau of Consumer Protection outlining an alternative "optional inspection" rule were forwarded to the Commission in July 1979.

The Commission met in October 1979 to consider whether to adopt a final rule, and if so, what form the rule should take. While no final determination resulted from the meeting, the mandatory inspection approach recommended by the staff was rejected by the Commission. The staff was directed to analyze an optional inspection rule.

During the next year and a half the proposed rule was redrafted and modified and additional comments were solicited and received. On April 14, 1981, the Commission met and determined not to adopt the "optional inspection rule," but instead approved in substance the rule subsequently vetoed by Congress.

Overview of the rule

The primary purpose of the rule was to prevent and discourage oral misrepresentations and deceptive omissions of material facts by used car dealers concerning warranty coverage and mechanical condition. The rule provided a uniform method for written disclosure of such information by means of a Used Car Buyers Guide ("Buyers Guide"). It required clear disclosure through the Buyers Guide of the existence of any warranty coverage and of the terms and conditions of any warranty offered in connection with the sale of a used car, including the duration of coverage and the percentage of total repair costs to be paid by the dealer.

The rule also included certain additional disclosures that were incorporated on the Buyers Guide, including a list of the fourteen major systems of an automobile; a suggestion that consumers ask the dealer if a prepurchase inspection is permitted; and a warning against reliance on spoken promises that are not confirmed in writing.

A Spanish-language version of the Buyers Guide was required if the used car transaction is conducted in Spanish. The rule included a text for a Spanish-language version.

In addition, the rule provided that the Buyers Guide disclosures were to be incorporated by reference into the sales contract, and were

to govern in the event of an inconsistency between the Buyers Guide and the sales contract. A further requirement of the rule was that dealers must give copies of the Buyer Guide reflecting the final terms of the sale to the consumer.

Lastly, the rule required the dealer to disclose on the Buyers Guide certain known defects in a used car offered for sale; those defects that must be disclosed, if known by the dealer, were listed in the text of the rule and on the back of the Buyers Guide.

Congressional exercise of the veto power

The used car rule was the first casualty of a legislative veto since Congress included a provision in the Federal Trade Commission Improvements Act of 1980 giving itself the power to kill the agency's regulations.

The rule was blocked on May 26, 1982, when the House voted 286–133 to approve a resolution of disapproval (S. Con. Res. 60, 97th Congress) on the last day allowed by law for action. The Senate had agreed to the same resolution on May 18th.

The complete record of congressional consideration of the detailed and complex rule, developed by the Federal Trade Commission during a six year period, in response to statutory directive, is as follows:

January 28, 1982: Referred to Senate Committee on Commerce.

March 29, 1982: Ordered to be reported.

May 18, 1982: Resolution Agreed to in Senate by yea-nay vote 69–27 (Record Vote No: 121).

May 19, 1982: Referred to House Committee on Energy and Commerce.

May 20, 1982: Ordered to be reported.

May 26, 1982: Called up by House as privileged matter and agreed to in House by yea-nay vote, 286–133 (Record Vote No: 107).

Development of the Legislative Veto

Since its early inception, the legislative veto has become extremely popular as a legislative device applicable to both executive actions and regulatory programs. The committee considers it constructive to provide a general overview of the subject in the context of this report.[26]

I. ORIGIN OF THE LEGISLATIVE VETO

The congressional veto was first employed in the Legislative Appropriation Act of 1932 (47 Stat. 413) to grant President Hoover the authority to reorganize executive departments and agencies subject to a congressional veto provision allowing either House to disapprove any reorganization proposal before it went into effect. When President Hoover submitted his reorganization order, it was disapproved by a House resolution (H. Res. 334, 72d Congress, 2d session). Although the congressional veto was originally most widely employed in executive reorganization legislation, it has in recent years been increasingly used in a great variety of other areas as well.

[26] The committee would acknowledge the considerable support and assistance of the Congressional Research Service in research relating to the development of the legislative veto and particularly notes the contribution of Clark F. Norton, Suzanne Cavanagh, and Rogelio Garcia of the Government Division whose work has been liberally used in this section.

II. INCREASING USE OF THE VETO

During the last half century Congress has enacted at least 190 laws containing more than 270 separate congressional veto provisions of some type. Adopted sparingly at first, the number of such acts increased markedly in the seventies; more than half of the total were passed in the last decade and nearly one third in the last five years. Likewise, the subject areas in which approval and disapproval procedures may be applied to certain executive proposals has been expanded through the years by legislation to include a rather wide selection of governmental activities, including among others such matters as executive reorganization, foreign affairs, armed services, public works, energy policy, Indian affairs, space administration, watershed protection, atomic energy, petroleum allocation, immigration, education, transportation, salary and pay levels, price controls, and impoundment of appropriated funds. Recent emphasis in an increasing number of bills has been to require congressional review and to permit possible rejection of proposed (and in some cases existing) rules and regulations. Although much discussed, comparatively few such provisions have been enacted into law.

III. VARIETIES OF THE LEGISLATIVE VETO

Uniformity or standardization of procedure has not been a leading characteristic of congressional veto devices. To the contrary, as many as 21 separate types can be distinguished, each of which differs with respect to whether advance approval is required or prior disapproval is permitted by either or both Houses of Congress, or committees thereof, and whether action shall be by passing a simple, concurrent or joint resolution, or some combination thereof. Most of the statutory provisions fall within the scope of four major legislative devices: first, disapproval by simple resolution passed by either House; second, disapproval by concurrent resolution passed by both Houses; third, approval by committees of both Houses; and fourth, approval by concurrent resolution passed by both Houses. However, a number of such provisions are distributed among at least 12 other kinds of procedures described below.

In addition to these basic types of congressional veto procedures, it should be noted that there are other variations within them with respect to such other features as time limits (if any) for action by committees or by one or both Houses, length of period before a proposal can become effective, right to waive a portion of the deferral period, kind or size of vote required, and special rules to assure and expedite legislative consideration. If these factors are incorporated in varying degrees in one or more of the basic congressional veto patterns, they tend to complicate an already complex matter. For example, many fix the time limit within which Congress must act on approval or disapproval resolutions at periods varying from as short as 5 days to as long as 6 months, but some have no time limit at all. Likewise, such bills in recent years often propose special Senate and House rules of procedure designed to implement and speed up reference, reports, discharge, floor consideration and debate of approval and disapproval resolutions. While these differences are important and should not be ignored, it is not possible in this brief survey to enumerate them.

Summary descriptions of the basic kinds of congressional veto procedures are arranged below in descending order according to the number of each type enacted by Congress since 1932. Each category also indicates the total number of acts and provisions for each type adopted since 1932 that have been located.

This section makes no attempt to catalog the approximately 230 bills pending in the present Congress but the committee would note that a complete listing has been prepared by, and is available from, the Congressional Research Service.

The principal variation of the veto are as follow:—

1. *Disapproval by Either House Passing a Simple Resolution* (57 laws with 95 provisions).—Often referred to as the "one-house veto," about one third of all congressional veto provisions enacted since 1932 authorize either House of Congress to reject a specified executive branch proposal by the passage of a simple resolution of disapproval. In most of these statutes, a proposal must be submitted in advance to both Houses of Congress and will become effective at the end of a stated period unless during that time either House adopts such a resolution. A few such bills permit either House to approve a disapproval resolution proposed by a State or Indian agency. While the length of the congressional review period varies, in nearly half of these provisions it is fixed at 60 days.

2. *Approval by Committees of Both Houses* (53 laws with 70 provisions).—Second in number of congressional veto provisions enacted and in number of acts is a procedure requiring prior approval by committees in both Houses of Congress before a particular proposal can become effective. Most of these do not restrict the time during which committees may act, but in all cases failure of the appropriate committee (or committees) in either House to grant consent will prevent a proposal from being implemented. A few statutes provide that lack of favorable action by one committee in either House will block the proposal immediately.

3. *Disapproval by Both Houses Passing a Concurrent Resolution* (43 laws with 61 provisions.)—The third most numerous type, sometimes known as the "two-house veto," permits both Houses of Congress to disapprove executive proposals by the adoption of a concurrent resolution. All but two of these provide that, unless such a resolution is passed by both Houses within a specified period of time, the proposal will become effective at the end of that period. A deferral period of 60 days for congressional review is established in about half of these, but others range from 29 to 90 days and at least two have no time limit.

4. *Approval by Both Houses Passing a Resolution* (16 laws with 27 provisions). Before certain matters may be carried out, at least 27 provisions have required that prior congressional approval must be obtained through the adoption by both Houses of a concurrent resolution; inasmuch as a few of these do not specify a concurrent resolution, a simple resolution may be used in those cases. In approximately one-third of the provisions of this type, such a resolution must be passed within 60 days, but another third impose no time limit whatsoever.

5. *Disapproval by Committee (or Committees) of Either House Resolution* (11 laws with 12 provisions).—At least 12 separate provisions authorize the appropriate committee (or committees) of either

House of Congress to reject certain executive branch proposals. Slightly more than half of these provide that unfavorable committee action must occur within 60 days, but in two cases that period is fixed at 90 days and in one each it is 30 days and 10 days respectively. If a proposal is not disallowed within the stipulated time, it will become effective. Some provisions permit an earlier implementation date, however, if the committee before the end of the period determines that it has no objection and so notifies the agency.

6. *Approval by Both Houses Passing a Joint Resolution* (7 laws with 11 provisions).—A number of bills introduced in recent years, several of which have been enacted, employ a joint resolution of approval (or disapproval as noted below) in place of a simple or concurrent resolution for purposes of congressional review. Questions raised about the constitutionality of congressional veto procedures perhaps have stimulated this change. In contrast to a simple or concurrent resolution, a joint resolution, if passed by Congress, must be submitted to the President for his signature. If approved by him, it would become public law; if vetoed by the President, it would fail unless overridden by a two-thirds vote of both Houses.

7. *Disapproval by Both Houses Passing and the President Approving a Joint Resolution* (5 laws with 6 provisions).—A few statutes authorize the rejection of certain executive proposals by the passage of a joint resolution of disapproval. Similar to a joint resolution of approval, under the Constitution such a measure must be presented to the President. While this device provides Congress with an opportunity (usually during a limited period) for prior review of a particular matter before it becomes effective, the possibility of a Presidential veto seems to lessen its usefulness as a congressional veto device.

8. *Agreement with Committees of Both Houses* (5 laws with 5 provisions).—Four statutes enacted between 1944 and 1952 required that, before certain military or naval real estate transactions or construction projects could be carried out, the secretaries of the respective departments involved must first "come into agreement" with the appropriate House and Senate committees. A more recent act (Public Law 96–79) directed the secretary of a particular department to "consult with" Senate and House Committees before promulgating certain regulations. Although not specifically conferring power of approval or disapproval as such, these laws do more than stipulate advance notification of proposed executive actions. Under such language restrictions it can be presumed departments probably would hesitate to undertake an action contemplated by the statute if the committees objected. While this congressional review procedure is basically similar to that of approval by committees of both Houses (category 3 above), it is classified separately here because the consent involved seems to be more informal in nature and might not require specific formal committee ratification as such.

9. *Approval by Both Houses Passing and the President Approving a Bill* (3 laws and 3 provisions).—Executive actions proposed under at least three laws may not be implemented unless specific approval is granted by the enactment of subsequent legislation. Very similar to congressional approval by passage of a joint resolution (see category VI above), which also would become public law when passed and

signed by the President, this type is distinguished here separately only because approval can be by means of a bill rather than a joint resolution.

10. *Disapproval by Committees of Both Houses* (3 laws with 3 provisions.)—Two acts permit proposed executive actions to be disapproved by committees in both Houses of Congress. In essence this procedure is the reverse of the more than 50 provisions (see category 3 above) which require approval in advance by committees of both Houses, except that a proposal can become effective in the absence of any committee action.

11. *Approval by Subcommittees of Both Houses* (2 laws with 2 provisions).—Two 1978 acts prohibited the obligation and use of certain funds appropriated for the Washington Civic Center (D.C.) until a plan for the Center had been approved by subcommittees in the Senate and the House of Representatives.

12. *Alternative Disapproval by One or by Both Houses Passing a Concurrent or Simple Resolution* (2 laws with 4 provisions).—Numerous bills in recent years have employed a new congressional review procedure combining features of the so-called one-House and two-House veto. This combined alternative approach, which is sometimes referred to as the "one and one-half type," provides for the rejection of an executive proposal by the adoption of a concurrent resolution (in a few cases by simple resolution) of disapproval either by (1) both Houses within a specified period (usually 90 calendar days of continuous session) or by (2) only one House within a shorter period (usually 60 calendar days of continuous session), which in turn is not disapproved by the other House within a certain period (usually 30 calendar days of continuous session). Such bills frequently provide also that if no committee in either House reports or is discharged from such a resolution of disapproval by the end of a stated period (usually 60 calendar days of continuous session), and if neither House within that time adopts such a resolution, the proposal can become effective at the end of that period. However, if any committee reports or if either House adopts such a resolution of disapproval within that specified period, the proposal cannot become effective until the longer period has expired.

13. *Approval by Committee (or Committees) of Either House* (1 law with 1 provision).—Although several laws authorize disapproval by a committee of either House (as noted before), only one statute has been located that appears to have required advance approval by a committee of either the Senate or the House of Representatives. An act passed in 1962 (Public Law 87–639) authorized the Committee on Public Works of either House to approve and to direct watershed area investigations and surveys to be conducted jointly by the Secretary of the Army and the Secretary of Agriculture. Although in one sense this may seem to be more in the nature of a directive than an approval procedure, such a proposed joint study could not be made unless at least one committee gave its consent.

14. *Approval by a Joint Committee* (1 law with 1 provision).—In at least one situation prior consent must be obtained from a joint committee before particular proposals can be carried out. Certain classes of work done at printing plants other than the Government Printing

Office (GPO), as well as printing in field plants operated by executive agencies or procured by them, according to a 1949 act (63 Stat. 405) are supposed to be approved in advance by the Joint Committee on Printing. A 1968 amendment (Public Law 90–260) further authorized the Joint Committee to approve contracts for printing and binding which the GPO is not able to perform.

15. *Approval by the Chairman of a Committee* (1 law with 1 provision).—Under one statute an executive agency must obtain the assent of a committee chairman before carrying out a particular proposal. Congress provided in 1952 (Public Law 82–547) that a Budget Circular controlling certain departmental and agency matters could be amended by the Budget Director only with the prior consent of the Chairman of the House Committee on Appropriations.

16. *Approval by a Congressional Agency–OTA* (1 law with 1 provision).—In 1979, Congress required (Public Law 96–151) that the protocol for a study to be conducted by the Veterans Administration must first be reviewed and approved by the Director of the Office of Technology Assessment (OTA), a congressional agency. The delineation of this procedure as a separate type of congressional veto was underscored by a Presidential veto of a bill that also provided for OTA approval of a similar study to be made by the Secretary of Health, Education and Welfare. Some two weeks after signing the first act, the President vetoed the second on the grounds that requiring advance approval by OTA would be an unconstitutional congressional veto device.

IV. CONGRESSIONAL VETO BILLS ENACTED IN THE 97TH CONGRESS

Congressional veto bills enacted during the present Congress include:

Public Law 97–12, Supplemental Appropriations and Rescission Act, 1981, Sec. 303. (Approved June 5, 1981; see H.R. 3512)

Public Law 97–35, Omnibus Budget Reconciliation Act of 1981, Secs. 516(d)(1)(B), 532(a), 1107(d), 1142, 1183(a)(2), 1207(a), 1207(c), 1207(d). (Approved Aug. 13, 1981; see H.R. 3982)

Public Law 97–86, Department of Defense Authorization Act, 1982, Secs. 202(a), 203(a)(1), and 911(a)(1). (Approved Dec. 1, 1981; see S. 815)

Public Law 97–92, Further Continuing Appropriations for Fiscal Year 1982, Secs. 101(d), 109, and 110. (Approved Dec. 15, 1981; see H.J. Res. 370)

Public Law 97–98, Agriculture and Food Act of 1981, Sec. 1523. (Approved Dec. 22, 1981; see S. 884)

Public Law 97–100, Department of the Interior and Related Agencies Appropriations, Fiscal Year 1982, Title II. (Approved Dec. 23, 1981; see H.R. 4035)

Public Law 97–101, Department of Housing and Urban Development and Independent Agencies Appropriation Act, 1982, Sec. 409 and 501(40). (Approved Dec. 23, 1981; see H.R. 4034)

Public Law 97–113, International Security and Development Cooperation Act of 1981, Secs. 102(a)(2), 109(a), 737(b), 737(c) two provisions. (Approved Dec. 29, 1981; see S. 1196)

Public Law 97–121, Foreign Assistance and Related Programs Appropriations Act, 1982, Title II and Sec. 514. (Approved Dec. 29, 1981; see H.R. 4559)

Public Law 97–125, Union Station Redevelopment Act of 1981, Sec. 3(3). (Approved Dec. 29, 1981; see S. 1192)

Public Law 97–216, Urgent Supplement Appropriations Act, 1982, Chpt. II (EPA and NASA) and Chpt. IV (BATF). (Approved July 18, 1982; see H.R. 6685)

Matters Required Under the Rules of the House

Comparative print

Clause 4(d) of rule XI requires reports from the Committee on Rules, on resolutions amending the Rules of the House of Representatives, to contain a comparative print indicating changes in the existing rules. Although the bill, as introduced, would make significant changes in the rules of the House, it would do so in a bill and in a manner that does not directly amend the Rules of the House of Representatives. The committee amendments strike all provisions of the introduced text enacted as an exercise of the rulemaking powers of the House.

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Clause 3 of rule XIII requires the report of each committee on a bill or joint resolution to contain a comparative print relating to the measure.

Changes in Existing Law

The changes proposed to be made to existing law by the bill as reported by the Committee on Energy and Commerce are shown on pages 19 through 26 of House Report 97–809, Part 1. Changes in existing law proposed by this committee which are identical to changes in existing law proposed by the Committee on Energy and Commerce are not reflected in this report.

For the information of the Members, the changes proposed by this committee to the Federal Trade Commission Act, as proposed to be amended by the Committee on Energy and Commerce, are shown as follows (matter proposed to be omitted is shown in italic and enclosed in black brackets):

Federal Trade Commission Act

* * * * * * *

[*Sec 25. (a)(1) The Commission, after promulgating a final rule, shall submit such final rule to the Congress for review in accordance with this section. Such final rule shall be delivered to each House of the Congress on the same date and to each House of the Congress while it is in session. Such final rule shall be referred to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House, respectively.*

[*(2) Any such final rule shall become effective in accordance with its terms unless—*

[*(A) before the end of the period of 35 calendar days of continuous session after the date such final rule is submitted to the Congress, a concurrent resolution disapproving such final rule is introduced in either House; and*

[(B) before the end of the period of 90 calendar days of continuous session after the date such final rule is submitted to the Congress, the Congress adopts a concurrent resolution disapproving such final rule.

[(b)(1) The provisions of this subsection are enacted by the Congress—

[(A) as an exercise of the rulemaking power of the Senate and the House, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of concurrent resolutions which are subject to this section, and such provisions supersede other rules only to the extent that they are inconsistent with such other rules; and

[(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

[(2)(A) Any concurrent resolution disapproving a final rule of the Commission shall, upon introduction, be referred immediately by the presiding officer of the House in which such concurrent resolution is introduced to the Committee on Commerce, Science, and Transportation of the Senate or to the Committee on Energy and Commerce of the House, as the case may be.

[(B) If a committee to which a concurrent resolution is referred under subparagraph (A) does not report such concurrent resolution before the end of the period of 75 calendar days of continuous session of the Congress after such referral, it shall be in order to move to discharge such committee from further consideration of such concurrent resolution.

[(C)(i) A motion to discharge in the Senate may be made only by a Member favoring the concurrent resolution, shall be privileged (except that it may not be made after the committee has reported a concurrent resolution with respect to the same final rule of the Commission), and debate on such motion shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the motion. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other concurrent resolution with respect to the same final rule of the Commission.

[(ii) A motion to discharge in the House may be made by presentation in writing to the Clerk. The motion may be called up only if the motion has been signed by one-fifth of the Members of the House. The motion is highly privileged (except that it may not be made after the committee has reported a concurrent resolution of disapproval with respect to the same rule). Debate on such motion shall be limited to not more than 1 hour, the time to be divided equally between those favoring and those opposing the motion. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

[(3)(A) *If one House receives from the other House a concurrent resolution disapproving a final rule of the Commission, then the procedure established in this paragraph shall apply.*

[(B) *If, at the time of such receipt, a committee of the receiving House had reported, or has been discharged from further consideration of, a concurrent resolution disapproving such final rule, then the concurrent resolution received from the other House shall not be referred to any committee. On any vote on final passage of the concurrent resolution of the receiving House, a motion shall be in order to substitute the concurrent resolution received from the other House for the concurrent resolution of the receiving House.*

[(C)(i) *If, at the time of such receipt, no committee of the receiving House has reported, or has been discharged from further consideration of, a concurrent resolution disapproving such final rule, then the concurrent resolution received from the other House shall be referred to the Committee on Commerce, Science, and Transportation of the Senate or to the Committee on Energy and Commerce of the House, as the case may be.*

[(ii) *If a committee to which a concurrent resolution is referred under clause (i) does not report such concurrent resolution before the end of the period of 35 calendar days of continuous session of the Congress after such referral, it shall be in order to move to discharge such committee from further consideration of such concurrent resolution. The provisions of paragraph (2)(C), as such provisions apply to the respective Houses, shall apply to any such motion to discharge.*

[(4)(A) *When a committee has reported, or has been discharged from further consideration of, a concurrent resolution disapproving a final rule of the Commission, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the concurrent resolution. The motion shall be privileged in the Senate and highly privileged in the House, and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.*

[(B) *Debate on the concurrent resolution shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the concurrent resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the concurrent resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which the concurrent resolution was agreed to or disagreed to.*

[(5) *Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House, as the case may be, to the procedure relating to a concurrent resolution disapproving a final rule of the Commission shall be decided without debate.*

[(6) *Notwithstanding any other provision of this subsection, if a House has approved a concurrent resolution disapproving a final rule of the Commission, then it shall not be in order to consider in such House any other concurrent resolution introduced in such House with respect to the same final rule.*

[(c)(1) *If a final rule of the Commission is disapproved by the Congress under subsection (a)(2)(B), then the Commission may promul-*

gate a final rule which relates to the same acts or practices as the final rule disapproved by the Congress in accordance with this subsection. Such final rule—

[(A) shall be based upon—

[(i) the rulemaking record of the final rule disapproved by the Congress; or

[(ii) such rulemaking record and the record established in supplemental rulemaking proceedings conducted by the Commission in accordance with section 553 of title 5, United States Code, in any case in which the Commission determines that it is necessary to supplement the existing rulemaking record; and

[(B) may contain such changes as the Commission considers necessary or appropriate.

[(2) The Commission, after promulgating a final rule under this subsection, shall submit the final rule to the Congress in accordance with subsection (a)(1).

[(d) Congressional inaction on, or rejection of, a concurrent resolution disapproving a final rule of the Commission under this section shall not be construed as an expression of approval of such final rule, and shall not be construed to create any presumption of validity with respect to such final rule.

[(e)(1) Any interested party may institute such actions in the appropirate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this section. The district court immediately shall certify all questions of the constitutionality of this section to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[(2) Notwithstanding any other provision of law, any decision on a matter certified under paragraph (1) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought not later than 20 days after the decision of the court of appeals.

[(3) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under paragraph (1).

[(f)(1) For purposes of this section—

[(A) continuity of session is broken only by an adjournment sine die at the end of the second regular session of a Congress; and

[(B) days on which either House is not in session because of an adjournment of more than 5 days to a day certain are excluded in the commutation of the periods specified in subsection (a)(2) and subsection (b).

[(2) If—

[(A) an adjournment sine die of the Congress which breaks the continuity of session (as specified in paragraph (1)(A)) occurs after the Commission has submitted a final rule under subsection (a)(1), but before any action necessary to disapprove the final rules is completed under subsection (a)(2)(B); and

[(B) such adjournment occurs (i) before the end of the period specified in subsection (a)(2)(B), in a case in which a concur-

rent resolution disapproving such final rule has been introduced in either House before the end of that period specified in subsection (a)(2)(A); or (ii) before the end of that period specified in subsection (a)(2)(A), in a case in which no such concurrent resolution has been introduced before such adjournment;

then the Commission shall resubmit such final rule at the beginning of the first regular session of the next Congress. The periods specified in subsection (a)(2) shall begin on the date of such resubmission.

[(g) For purposes of this section:

[(1) The term "concurrent resolution" means a concurrent resolution of the two Houses of the Congress the matter after the resolving clause of which is as follows: "That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of , which final rule was submitted to the Congress on .". (The blank spaces shall be filled appropriately.)

[(2) The term "rule" means any rule promulgated by the Commission pursuant to this Act, other than any rule promulgated under section 18(a)(1)(A).]

* * * * * * *

Congressional Budget Office estimates

Clause 2(1)(3)(C) of rule XI requires each committee report to contain any cost estimate and comparison prepared by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974. No such estimate has been received by the committee. However the committee is aware that such an estimate was prepared for the Committee on Energy and Commerce and appears in the report of that committee to accompany the bill (H. Rept. 97–809, Pt. I, p. 18–9).

Clause 2(1)(3)(B) of rule XI requires each committee report to contain any statement required by section 308(a) of the Congressional Budget Act of 1974. That section does not apply to this bill.

Committee cost estimate

Clause 7(a) of rule XI requires certain committee reports to contain committee cost estimates. That provision does not apply to the Committee on Rules but the committee explores the cost implications of all measures it considers.

The committee believes that any legislative veto has substantial cost implications, which are difficult to quantify, on both the legislative branch and on any agency to which it applies and assumes that adoption of the committee amendments will reduce the cost implications of the bill.

Oversight findings

Clause 2(1)(3)(A) of rule XI requires each committee report to contain oversight findings and recommendations required pursuant to clause 2(b)(1) of rule X. The Committee has made no special oversight findings in connection with the bill and notes that, under the rules of the House, oversight responsibility with regard to the Federal Trade Commission is vested in the Committee on Energy and Commerce.

The committee would refer to its statement under the section of this report entitled "Scope of Report" and defers, on this matter, to the report to accompany the measure made by the Committee on Energy and Commerce (H. Rept. 97–809, Pt. I).

Oversight findings and recommendations of the Committee on Government Operations

Clause 2(1)(3)(D) of rule XI requires each committee report to contain any oversight findings and recommendation made by the Committee on Government Operations pursuant to clause 4(c)(2) of rule X. No such findings and recommendations have been received.

Inflation impact statement

Clause 2(1)(4) of rule XI requires each committee report to contain a statement relating to the inflationary impact of the enactment of that measure. The committee is aware of none.

The committee would refer to its statement under the section of this report entitled "Scope of Report" and defers, on this matter, to the report to accompany the measure of the Committee on Energy and Commerce. (H. Rept. 97–809, Part 1, p. 19).

MINORITY VIEWS

We strongly oppose the Committee amendment to delete from H.R. 6995 section 7 which provides congressional review and disapproval authority over proposed FTC rules; and we are confident, based on recent congressional expressions on this matter, that a majority of our colleagues will agree with us on the need to retain this important oversight tool.

As recently as August 13, 1982, the House recommitted a rule making in order an appropriations bill which included funds for the FTC mainly because the bill did not contain an extension of the expiring congressional veto authority over the agency's rules. We are convinced that it was that clear signal from the House that forced the Energy and Commerce Committee to reverse the decision of its Subcommittee on Commerce, Transportation and Tourism and include the legislative veto provision in this authorization bill as part of the permanent law. It is curious that the Rules Committee is now attempting to delete the legislative veto provision after having one of its own rules thrown back in its face over this very issue.

In fact, as this Committee's report makes clear in its section on the "Development of Federal Trade Commission Restrictions," the whole fate of the agency has been closely tied to congressional insistence on the legislative veto authority for the past three Congresses. As the report notes, in 1978, the Congress rejected two conference reports providing four-year authorizations for the Commission, mainly because the bills did not include legislative veto povisions acceptable to the House. As a consequence, the Commission operated under continuing appropriations, without statutory authorization, during fiscal years 1978, 1979 and most of 1980. The situation because so strained in fiscal 1980 that the agency was twice forced to close its doors when temporary funding measures had expired. And, even when its doors were open, the agency was barred by the temporary funding acts from finalizing any pending trade rules or initiating any new rulemaking proceedings.

The impasse over the fate of the FTC was finally broken in late May of 1980 when President Carter signed into law the "Federal Trade Commission Improvements Act" (PL 96–252) which included a two-House veto over FTC regulations. As the report of the House Interstate and Foreign Commerce Committee noted in recommending a legislative veto in its bill:

> In the last Congress, the House of Representatives three times expressed its desire that FTC rules which proscribe "unfair or deceptive acts of practices" be subject to a "legislative veto" provision. The Committee has responded to the express will of the House by including a legislative veto provision in H.R. 2313. (H. Rept. 96–181, p. 10)

In signing the bill into law, President Carter swallowed his own constitutional objections to the legislative veto provision because, in his words, "the very existence of this agency is at stake."

It is difficult to believe that those who now advocate deleting the legislative veto provision from H.R. 6995 wish to jeopardize once again "the very existence" of the FTC. And yet, should they prevail, that would be the likely consequence if recent history is any guide.

WHY THE LEGISLATIVE VETO?

As the Committee report correctly notes, the legislative veto is not some recent or untested phenomenon: "During the last half century Congress has enacted at least 190 laws containing more than 270 congressional veto provisions of some type." In this Congress alone, according to the report, eleven laws have been enacted containing 29 legislative veto provisions. But it is true that more than half the veto provisions now on the books were enacted in the last decade and nearly one-third in the last five years.

This increasing resort to the legislative veto in controlling Executive actions is in response to certain excesses of the past decade and the resultant determination of the Congress to reassert itself vis-a-vis the Executive Branch and right the balance of powers intended by the Framers of the Constitution. Not the least of the concerns of Congress in recent years has been excessive regulation by Executive and independent agencies and its impact on individuals, businesses and the economy. Moreover, there was a growing perception that regulations were often inconsistent with the intent of Congress and the statutes they were designed to implement. In short, Congress felt it had lost control of the bureaucracy it had created and that unelected bureaucrats were substituting their judgment for that of the elected representatives of the people.

The legislative veto was a natural response to the trend of unaccountable, regulatory overkill. It was an especially appropriate response in the case of proposed regulations since the delegation of rulemaking authority is a delegation of legislative power: regulations are, in effect, further amendments to the basic law and, once finalized, have the force and effect of law. Given the often flagrant abuse of that delegated power by certain agencies, Congress determined to partially reclaim its legislative authority, not by denying agencies the authority to issue regulations or by writing detailed regulations into law instead, but rather by the check of congressional review and disapproval authority over regulations proposed by agencies.

The use of the legislative veto over regulations is a recent development, the first being enacted in 1970. According to a Congressional Research Service study, there were 29 statutes containing 47 legislative veto provisions applicable to rules and regulations by the end of the 96th Congress, 14 of those provisions being enacted in the last Congress alone. In this Congress four veto provisions were contained in the 1981 Reconciliation Act alone. This increasing reliance on the regulation disapproval mechanism has led to increased pressure for a generic law applicable to all rules and regulations in order to bring more uniformity and predictability to the process. The most popular of these bills is H.R. 1776, the Administrative Rule Making Reform

Act, introduced by Representative Levitas, which now has 254 co-sponsors. An attempt will be made to attach a modified version of the Levitas veto provision to the pending regulatory reform bill, H.R. 746.

But, given the uncertain status of that legislation, it is understandable that the Congress will continue to insist on greater regulatory control and relief through reliance on the veto mechanism on an issue-by-issue basis. Regulatory reform and relief have been major issues in the last several election campaigns and makeup one of the four principal components of the current Administration's Economic Recovery Program. While the Administration is to be commended on its efforts in this area to date, it cannot accomplish this job alone. The Congress must join with the Administration to insure greater regulatory control and accountability, and the legislative veto device for regulations is one of the most effective weapons in the congressional oversight arsenal. It would be the height of folly for the Congress, in the midst of its battle against excessive regulation, to unilaterally disarm itself of the veto weapon for FTC regulations as the Committee amendment proposes.

OBJECTIONS TO THE LEGISLATIVE VETO

The Committee report bases its objections to the legislative veto for FTC rules on grounds that it is unconstitutional, unnecessary, and that it imposes needless and cumbersome burdens on the efficient operations of the Commission and the Congress.

Constitutionality.—It is curious that in the half century this constitutional controversy has been kicking around, the Supreme Court has yet to find the legislative veto unconstitutional, though it has had numerous opportunities to do so. To date the Court has sidestepped the issue adroitly for various reasons, not the least being that it is a political question. The Court will have at least three more opportunities next term to rule on the constitutionality of the legislative veto. The lower courts and all manner of constitutional scholars have come down on both sides of this issue over the years. Obviously the Congress has not been persuaded that the legislative veto is unconstitutional over the last half century: the number of legislative veto provisions enacted has grown in direct proportion to the number of legal briefs which have been filed on this issue.

While the Committee report implies that the Committee has found the legislative veto mechanism "unconstitutional," the Committee actually made no such determination in voting to allow an amendment to strike the veto provision. The report did not materialize until the day after that vote occurred. The only reference made to the constitutional issue during the Committee markup of this bill was the following comment by its author on offering the amendment:

> I recommend the amendment because I have constitutional reservations about the veto in general, and I consider this case to present the constitutional issue more compellingly than almost any other.

No further discussion, let alone consensus, on the constitutionality of the legislative veto occurred during that meeting.

The Committee report also implies that its constitutional finding is based on the extensive work of one of its subcommittees over a four-year period. It is true that the Subcommittee on Rules of the House has held extensive hearings on the legislative veto issue over the past two Congresses. But the subcommittee never reached a consensus on the constitutional issues involved, nor did it ever vote on any of the various pending legislative veto bills. The subcommittee chairman, however, did issue a "committee print" in March of 1980 entitled, "Recommendations on Establishment of Procedures for Congressional Review of Agency Rules." In that print's discussion of the "Constitutional Questions" the subcommittee chairman concluded that the legislative veto was constitutional, but that it should still be rejected on practical grounds. In responding to the most serious constitutional objection to the veto—that it violates Article I, Section 7, Clause 3, which requires that "every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States"—the committee print correctly notes that this clause was intended to apply to all "votes" or "resolutions" having the effect of law. The print goes on as follows:

> It is reasonable to conclude that a resolution of disapproval applied to a rule proposed by an agency pursuant to a statutory grant of authority should not be considered as "lawmaking" within the meaning and intent of Clause 3. The resolution of disapproval, if adopted, does not change or amend the existing statutory law, nor does it set forth standards regulating private conduct or governmental activity which are traditional attributes of lawmaking. Neither does the disapproval of a regulation make new law; the status quo is preserved. In this connection it should also be noted that the adoption of a resolution of disapproval does not preclude an agency from redrafting and resubmitting a rule which was previously disapproved.

The same subcommittee chairman issued another print in this Congress entitled, "Background Information on Regulatory Reform and Congressional Review of Agency Rules" (June 1981) which contained a more objective discussion of the constitutional issues without drawing any conclusions about the constitutionality of the legislative veto. In fact, the print specifically indicates that "no premature conclusion about the constitutionality" of the legislative veto had been reached.

It is ironic that the same subcommittee chairman is now the author of the Committee amendment and report which finds the legislative veto unconstitutional. We find his constitutionality finding for the legislative veto in the last Congress much more convincing than his most recent conversion. At the very least Members should be persuaded by his comments of last year that drawing any conclusions about the constitutional issue would be "premature." Ultimately it is for the Supreme Court, not the Congress, to make that final determination.

Veto Unnecessary.—The Committee report argues that the two-House disapproval procedure for rules is unnecessary because Congress can always pass a law to reverse an agency action it doesn't like.

But this argument overlooks one of the most important needs for the legislative veto: to prevent a rule from taking effect before any damage is done. Too often congressional oversight has meant overlooking the implementation of a statute until the complaints begin pouring in from those affected by the regulations. If Congress is truly fulfilling its oversight function then committees should be taking an especially keen interest in the initial implementation stages of a statute by an agency. This means close consultation with agency officials to insure that the intent of Congress is being correctly interpreted in developing regulations. This is the main benefit of the congressional review and disapproval authority over regulations.

Burdensome for FTC.—The Committee report indicates that the legislative veto "imposes needless and cumbersome burdens on efficient operations of the Commission." This conclusion totally ignores the findings of the GAO contained in its report, "Impact of Congressional Review on Federal Trade Commission Decisionmaking and Rulemaking Processes," issued pursuant to a requirement in the 1980 FTC Improvement Act. To quote from that report:

> The congressional review has had little impact on FTC's rulemaking and decisionmaking processes. We identified only one clearly discernible impact on the rulemaking process—FTC added a procedural step to transmit final rules to the Congress. Other changes in the rulemaking process were unrelated to congressional review, (GAO/HRD–82–89, Aug. 17, 1982, p. 1.)

The only noticeable effect of the congressional review requirement contained in the 1980 Act has been some additional delays in issuing a final rule. We are pleased that the Energy and Commerce Committee has included certain provisions in H.R. 6995 to avoid such problems in the future—namely the provision to continue the review period from one session of a Congress to another, and the provision to permit a rule to take effect after 35 days of its submission to Congress, if no resolution of disapproval has been introduced in either House.

Burdensome for Congress.—The Committee report argues that the legislative veto "insures a vote in each House of Congress on virtually all Commission rules," and, taken together with other existing veto provisions, "could threaten the ability of the Congress to carry out its regular responsibilities." The report goes on to warn that, "In the aggregate, there are as many federal rules in a year as there are hours."

If this argument had any validity, then the Congress would already be in a state of continuous chaos from dealing with disapproval resolutions on a daily basis. As has already been noted, there are now over 270 veto provisions in law, many containing expedited procedures for consideration. And yet, as a CRS report commissioned by a member of the Rules Committee reveals, in the years 1972–80, only 85 approval or disapproval resolutions were passed by one or both Houses, most of which were for the sole purpose of disapproving deferrals under the Budget Act, even though 743 such resolutions had been introduced during that period. Of the number passed only 14 applied to executive rules and regulations. In this Congress the House has considered only 10 disapproval resolutions, 6 of which were on deferrals, one relating to the FTC used car rule, one relating to certain education regulations,

one on the sale of F–16 aircraft to Pakistan, and one on an action of the D.C. City Council.

The evidence clearly indicates that legislative veto resolutions are not consuming an inordinate amount of the time of the House or disrupting its proceedings. Members and committees have resorted to the actual use of the veto device both selectively and sparingly. Its most important use is not in its actual deployment but in the knowledge that it could be deployed if necessary. It is its potential use, as a measure of last resort, that causes agencies to consult more with committees in developing regulations and to be sensitive to legislative intent.

CONCLUSION

The Committee amendment to delete the legislative veto for FTC rules from H.R. 6995 is inimical to the interests of the Congress, the FTC and the American people. The Congress has discovered from years of experience that the mere existence of the veto device is an important check on Executive power. It not only helps to insure greater accountability from unelected bureaucrats, but it forces the Congress to exercise better oversight. As such it has been one of the most important innovations of the last decade in strengthening the institution of Congress. To strip the Congress of this vital tool now would be a backward step.

Even the current chairman of the FTC has recognized that the legislative veto is a useful means of controlling the rulemaking activities of independent agencies, though he has reservations about its constitutionality. The chairman is probably also aware from recent history that the fate of the agency would once again be jeopardized if Congress does not retain the veto authority.

Finally, the American people can be reassured that Congress is serious about curbing excessive and costly regulations by assuming responsibility for their final approval. The legislative veto is a clear sign control of government is being returned to the people.

JAMES H. QUILLEN.
DELBERT LATTA.
TRENT LOTT.
GENE TAYLOR.
JOHN J. RHODES.

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